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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1022

PAUL LUCERO, a minor child,

Petitioner,

v.

ROOSEVELT IRRIGATION DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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Judicially established blanket immunity granted to canal and irrigation system owners from tort liability constitutes an unreasonable, arbitrary and capricious denial of petitioner's right to recover damages resulting from respondent's negligence, and has no real and substantial relation to the object sought to be attained, i.e., the preservation of a canal and irrigation system which is indispensable to the maintenance of life and property in the State of Arizona.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

PAUL LUCERO, a minor child,

Petitioner,

v.

ROOSEVELT IRRIGATION DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

The petitioner PAUL LUCERO respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Arizona entered in this proceeding on November 19, 1974.

OPINION BELOW

The memorandum decision of the Court of Appeals, State of Arizona, affirming the trial court's order granting summary judgment, and the order of the Supreme Court of the State of Arizona, denying acceptance of the Petition for Review of the memorandum decision of the Court of Appeals, both of which are unreported, appear in the appendix hereto.

JURISDICTION

The order of the Supreme Court of the State of Arizona denying acceptance of the petition for review of the memorandum decision of the Court of Appeals, State of Arizona, was entered on November 19, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction

is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Does the judicially created special immunity from tort liability which has been granted to canal and irrigation system owners in the State of Arizona, and to no one else, violate the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution by precluding recovery for personal injuries sustained resulting from the negligence of a canal or irrigation system owner.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, amendment XIV, §1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARIZONA CONSTITUTION, art. 2, §13:

"Section 13. No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

STATEMENT OF THE CASE

On August 7, 1969, petitioner, who was 13 years old at the time, and his companion, crawled through a concrete pipe that led into a diversion box, or turnout box, that was owned and operated by respondent and located within the City of Phoenix, State of Arizona.

The diversion box, which serves the purpose of changing the direction of the flow of water within an irrigation system, was constructed of concrete and was approximately 4 feet wide and 105 inches deep. There was a ladder permanently affixed to the inside wall of the diversion box and the top was covered with a metal plate which had been welded to the box.

There were two pipes entering the box, one from the upstream side and one from the downstream side, the latter of which is the pipe through which petitioner and his companion entered the diversion box. The pipe entering the diversion box from the upstream side, through which the flow of water entered the box, was an underground pipe approximately 2500 feet in length. The pipe entering the diversion box from the

downstream side which was 30 inches in diameter carried water from the box into an open irrigation ditch, otherwise referred to as an open lateral.

There was no grate, or protective device of any kind, preventing entry into the concrete pipe through which the petitioner and his companion entered into the diversion box. The reason given for the failure to grate or screen the downstream pipe was that there would be no way to remove any trash or debris that could accumulate behind such a protective device. The validity of this assertion is strenuously disputed by petitioner and constitutes one of the issues of fact which was never presented to the trial court in view of its order granting summary judgment as a matter of law.

No permanent warning device was

ever affixed to the diversion box. Paper warning signs had been previously posted on the diversion box but those were destroyed almost as soon as they were placed on the box.

Respondent's superintendent was aware that children played in respondent's canals and in the specific canal near the subject diverison box.

After gaining entry to the diversion box through the unscreened downstream pipe, petitioner and his companion were trapped inside when, because of the increasing water pressure that was caused by the filling of the diversion box with water, they were unable to remove boards which had been placed against the opening of the downstream pipe from inside the diversion box.

When the diversion box became filled with water with the boys trapped

inside, petitioner suffered severe and irreparable brain damage and his companion suffered death. Petitioner was removed from the diversion box 25 minutes after he became trapped inside by firemen who were called to the scene and who were able to cut an opening in the metal top by use of an acetylyne torch.

As a result of the above circumstances, petitioner filed his complaint against respondent on October 7, 1970, alleging that the petitioner's injuries were proximately caused by the respondent's negligence. Respondent's answer, which was filed on December 1, 1970, alleged that respondent had no duty of any kind to plaintiff [petitioner] under the then existing circumstances.

On February 16, 1971, respondent

filed a Motion for Summary Judgment which was opposed by petitioner and denied by the trial court on April 1, 1971.

On September 13, 1971, respondent filed a Supplemental Motion for Summary Judgment which was also opposed by petitioner but which was granted by the trial court on October 7, 1971.

On October 15, 1971, a formal judgment granting respondent's Supplemental Motion for Summary Judgment was entered by the trial court wherein it was provided that:

> "The court finds that there is no genuine issue as to any material fact relating to the liability of the defendant and that it is, therefore, entitled to judgment as a matter of law."

A Notice of Appeal from the trial court's judgment was filed on

December 14, 1971, and on August 1, 1974, the Court of Appeals issued its memorandum decision affirming the trial court's judgment.

The Motion for Rehearing filed by petitioner was denied by the Court of Appeals and a Petition for Review was subsequently filed with the Supreme Court of the State of Arizona.

On November 19, 1974, the Supreme Court of the State of Arizona entered its order denying petitioner's Petition for Review, with two of the five justices voting to grant the petition.

Constitutional arguments based upon section 1 of the Fourteenth Amendment to the United States Constitution were initially raised by petitioner, before the trial court, in response to respondent's Supplemental Motion for Summary Judgment

and were again raised as assignments of error in the case on appeal. Neither the trial court, in its judgment, nor the appellate courts, in their opinions, discussed the constitutional issues raised by petitioner with regard to the petitioner's allegation that he was being denied equal protection of the law.

REASON FOR GRANTING THE WRIT

JUDICIALLY ESTABLISHED BLANKET IMMUNITY GRANTED TO CANAL AND IRRIGATION SYSTEM OWNERS FROM TORT LIABILITY CONSTITUTES AN UNREASONABLE, ARBITRARY AND CAPRICIOUS DENIAL OF PETITIONER'S RIGHT TO RECOVER DAMAGES RESULTING FROM RESPONDENT'S NEGLIGENCE, AND HAS NO REAL AND SUBSTANTIAL RELATION TO THE OBJECT SOUGHT TO BE ATTAINED, I.E., THE PRESERVATION OF A CANAL AND IRRIGATION SYSTEM WHICH IS INDISPENSABLE TO THE MAINTENANCE OF LIFE AND PROSPERITY IN THE STATE OF ARIZONA.

In the case of Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P.441 (1909), the Supreme Court of the State of Arizona was confronted with the question as to whether the facts in

Salladay brought that case within the decision of the so-called "Turntable Case", i.e., Railroad Co. v. Stout, 84 U.S. (17 Wall.) 657 (1873). Simply stated, the Arizona Supreme Court was asked in Salladay to determine whether to apply the attractive nuisance doctrine to canals.

As noted in Salladay:

> "The so-called 'turntable decision', as announced in the Stout case, is to the effect that where a child, so young as not to realize the danger, and a technical trespasser, is injured while playing upon a turntable upon the railroad company's premises, which the railroad company, knowing its attraction to children, has negligently left unlocked, the company is liable in damages for such injuries, where by reasonable care the danger might have been obviated." Id. at 128, 100 P. at 442.

In considering the question of liability in conjunction with the particular facts of its case, i.e., an action to recover damages for the wrongful

death of an infant of the age of three years which resulted when such infant fell into an open flume maintained by the defendant, on the defendant's property, and was swept to her death by the force of the water being borne by the flume, the Arizona Supreme Court held that such facts did not present a case that was covered by the "Turntable" decision. The court reasoned:

> "Not only flumes, but irrigation ditches, large and small, similar in purpose, construction and use, and equally dangerous and alluring to the child, are to be found throughout the territory wherever cultivation of the land is carried on, and such conduits, practically impossible to render harmless, are indispensable for the maintenance of life and prosperity. There is no distinction that can properly be drawn for liability for injuries received by a child from any of such various means of diversion or use of water. Both as a matter of law and as a matter of public policy we feel that the so-called "turntable" doctrine should not be extended to cover such a case as is here

presented." Id. at 129-30, 100 P.442. (Emphasis original).

In subsequent decisions, the Arizona Supreme Court has:

> ". . .built upon and extended the Salladay decision to provide almost complete immunity to irrigation districts in Arizona in the maintenance not only of the canals and diversion points, but also various mechanical and electrical equipment needed to operate the water distribution system." Dombrowski v. Maricopa Co. Mun. Wat. Cons. Dist., 108 Ariz. 275, 276, 496 P.2d 136, 137 (1972).

Simply stated, no Arizona court, since Salladay, regardless of the factual circumstances presented, has failed to grant summary judgment against the plaintiff in a cause of action for personal injuries resulting from the negligent maintenance, construction or operation of canals, diversion points or any of the various mechanical and electrical equipment needed to operate the water distribution system which allegedly

constituted an attractive nuisance. Lee v. Salt River Valley Water User's Ass'n, 73 Ariz. 122, 238 P.2d 945 (1951); City of Glendale v. Sutter, 54 Ariz. 326, 95 P.2d 569 (1939); Elkins v. Roosevelt Water Conservation District, 22 Ariz. App. 130, 524 P.2d 964 (1974); Rodriquez v. Salt River Valley Water Users Ass'n, 19 Ariz. App. 223, 506 P.2d 263 (1973); Hersey v. Salt River Valley Water Users Ass'n, 10 Ariz. App. 321, 458 P.2d 525 (1969).

Petitioner submits that the blanket immunity granted to irrigation districts by Salladay, and its progeny, is unreasonable, arbitrary and capricious when applied to the facts and circumstances of the instant case.

As was stated by the Arizona Supreme Court in Stone v. Arizona Highway Commission, 93 Ariz. 384, 381 P.2d 107 (1963), wherein such court swept

away the doctrine of governmental immunity for negligent conduct:

> " There is perhaps no doctrine more firmly established than the principle that, liability follows tortious wrongdoing; that where negligence is the proximate cause of injury, the rule is liability and immunity is the exception." Id. at 392, 381 P.2d at 112.

In Stone, the Arizona Supreme Court was asked to affirm a rule, and refused to do so, that denied recovery to one injured by reason of the negligent maintenance of the highway by certain state officials, even though recovery could be had by one injured in a city which had failed to properly maintain its own streets.

However, in the instant case, the Arizona Supreme Court refused, by denying acceptance of petitioner's Petition for Review, to strike down a

rule that denies recovery to one injured by negligent construction, maintenance or operation of an attractive nuisance by the owner of an irrigation system, when liability is clearly recognized for the construction, maintenance or operation of an attractive nuisance by any party or person other than an irrigation system owner.

No other entity which provides services necessary to the maintenance of life and prosperity in Arizona such as electricity, natural gas, and telephone service or constructs and maintains intra-state highways, including the State of Arizona itself, is immune from liability resulting from the negligent maintenance of an attractive nuisance.

Furthermore, the immunity granted to irrigation system owners extends only to liability arising from the negligent construction, maintenance or operation

of the irrigation system itself and does not extend to those other functions necessarily attendant to such irrigation system which do not constitute an integral part thereof, such as the operation of motor vehicles and the maintenance of properties other than the irrigation system itself, owned or occupied by an irrigation system.

In light of present geographic, economic and social conditions existing in the Phoenix metropolitan community, the preservation of a judically created blanket immunity from tort liability for one privileged class, i.e., irrigation system owners, is unjustifable, unreasonable, arbitrary and capricious and, therefore, denies petitioner equal protection of the law.

In addition to the foregoing, such blanket immunity has no real and substantial relation to the object sought

to be attained which is the preservation of a canal and irrigation system which, admittedly, is indispensable to the maintenance of life and prosperity in the State of Arizona.

It must be noted that petitioner does not dispute the validity of the argument advanced in support of Salladay to the effect that preservation of a canal and irrigation system is indispensable to the maintenance of life and prosperity in the State of Arizona. However, petitioner strenuously disputes that the preservation of a canal and irrigation system requires the application of a judically created blanket immunity from tort liability to the owners of such systems.

It is not, as was the case with the flume in Salladay, ". . .practically impossible to render harmless. . ." a diversion box located in an urban area such as the one in the instant case.

All that would have been required in order to render such diversion box practically harmless was the installation of a metal grate over the downstream pipe so as to preclude entry into the box. With regard to such installation, one of the issues of fact that would be presented to a jury, in the absence of a summary judgment, would be whether the failure to install a metal grate over the entrance to the downstream pipe constituted negligent conduct.

It can not be too strongly emphasized that petitioner does not seek abrogation of the Salladay doctrine as originally set forth and as is still applicable to open waterways, such as the flume in Salladay or the open lateral in the instant case. However, when an unreasonably hazardous condition, such as the downstream pipe which lured petitioner and his companion to their respective "deaths," is

maintained by an irrigation system owner, in the face of knowledge that children frequently play in, or about such structures, the rationale of Salladay can not be justifably extended to provide unbridled immunity from tort liability to a negligent party.

This distinction was well recognized by Judge Cameron in his dissenting opinion in Hersey v. Salt River Valley Water Users Ass'n, supra, as follows:

> " I must dissent from the opinion in that I believe the failure to properly maintain a grate at the entrance to the underground culvert is indeed a meaningful distinction." Id. at 328, 458 P.2d at 432.

As Judge Cameron recognized, the time has come to draw a "meaningful distinction" between the Salladay doctrine, as originally conceived, and the improper application of such doctrine to the facts and circumstances as presented herein.

In other words, the time has come to draw a "meaningful distinction" between the immunity that the Arizona Supreme Court has historically given to open irrigation canals on the one hand, and the negligent design and maintenance of mechanical or electrical equipment, wiers, dams and diversion points in congested urban areas on the other hand.

Nor can it be realistically argued that the cost of acquiring suitable protection for liability arising from negligent conduct in the form of liability insurance is a factor which could be used to discourage the irrigation of the arid desert land of this state inasmuch as liability insurance is now readily available with which the irrigation districts, as do other utility type entities which serve the public, could adequately protect themselves from the consequences of any

negligence.

Assuming arguendo that the cost of such liability insurance were prohibitive, the Arizona Supreme Court itself in Salt River Valley Water Users Ass'n. v. Compton, 39 Ariz. 491, 505, 8 P.2d 249, 254 (1932), stated that:

> ". . .the mere cost of giving to another that protection to which the law says he is entitled should never be an excuse for failure to provide it."

In addition to the foregoing, the Arizona Supreme Court's interpretation and extension of the Salladay doctrine, under present day circumstances and with specific regard to the facts of the instant case, constitutes judicial legislation which is prohibited by and contrary to article 2, §13 of the Arizona Constitution which prohibits the enactment of any law granting to any citizen, class of citizens or corporation, other

than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations. By establishing such judicial immunity from tort liability for a specific class of citizens, i.e., irrigation system owners, the Arizona Supreme Court has, in fact, denied the petitioner and others similarly situated equal protection of the law in that they are confronted with a privilege or immunity which does not, upon the same terms, apply equally to all citizens or corporations.

Based upon the foregoing, petitioner respectfully submits that the judicially created special immunity for irrigation system owners is, in addition to being unreasonable, arbitrary and capricious, devoid of any real and substantial relation to the object sought to be attained and is, therefore, in violation of the pro-

tection afforded by section 1 of the Fourteenth Amendment to the United States Constitution. Nebbia v. New York, 291 U.S. 502 (1934).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of the State of Arizona.

Respectfully submitted,

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409 Luhrs Building
11 West Jefferson
Phoenix, Arizona 85003

Andrew G. Galasky

D. Wayne Brown

Counsel for Petitioner

APPENDIX

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PAUL LUCERO, a minor child, by his next best friend and mother, SYLVIA LUCERO, Plaintiff, vs. ROOSEVELT IRRIGATION DISTRICT, Defendant.	No. C240182 JUDGMENT (Div. 16 - Froeb)

The motion of the defendant ROOSEVELT IRRIGATION DISTRICT, for summary judgment, having come on regularly for hearing on the 6th day of October, 1971, and counsel for the parties having been present, and the pleadings and arguments of counsel having been made and considered, good cause having been shown, the matter having been under advisement.

The court finds that there is no genuine issue as to any material fact relating to the liability of the defendant and that it is, therefore, entitled to judgment as a matter of law. There being no just reason for delay.

IT IS HEREBY ORDERED that the defendant's Motion for Summary Judgment is granted and final judgment is hereby entered in favor of the defendant ROOSEVELT IRRIGATION DISTRICT, and against the plaintiff.

IT IS FURTHER ORDERED that the defendant shall recover its costs herein incurred.

DONE IN OPEN COURT this 15 day of October, 1971.

/s/ Donald F. Froeb
J U D G E

Copy of the foregoing
mailed this 15th day
of October, 1971, to:

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Attorneys for Plaintiff

George H. Mitchell

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED AUG 1 1974
CLASSIE GANTT, CLERK
By /s/ Muriel S. Hume
Muriel S. Hume, Deputy

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PAUL LUCERO, a minor child, by his next best friend and mother, SYLVIA LUCERO,	1 CA-CIV 1946 DEPARTMENT A
Appellant,	MEMORANDUM DECISION
v.	[Not for publication; Rule 48, Rules of the Arizona Supreme Court]
ROOSEVELT IRRIGATION DISTRICT,	
Appellee.	

An appeal from the Superior Court

of Maricopa County

Cause No. C-240182

The Honorable Donald F. Froeb, Judge

AFFIRMED

Meadow, Nastro & Thrasher
by Stephen T. Meadow
Kenneth A. Winsberg
Attorneys for Appellant Phoenix

O'Connor, Cavanagh, Anderson,
Westover, Killingsworth & Beshears
by Lorin G. Tobler
Attorneys for Appellee Phoenix

OGG, Judge

In this appeal we must determine if, under the facts of this case, the Appellee-Defendant Roosevelt Irrigation District is entitled to negligence immunity under the doctrine of SALLADAY v. OLD DOMINION COOPER CO., 12 Ariz. 124, 100 P. 441 (1909).

This negligence action was brought by Sylvia Lucero on behalf of her thirteen year old son, Paul Lucero, for injuries he suffered in a concrete diversion or turn-out box owned and maintained by Roosevelt Irrigation District.

The trial court granted the Irrigation District's motion for summary judgment and Lucero filed this appeal.

Paul Lucero, while playing near the intersection of 24th Avenue and West Durango, Phoenix, Arizona entered an open pipe approximately thirty inches in diameter which led into a diversion box owned by the Irrigation District. Once inside the box Lucero, along with a young companion, placed boards over the only available exit to the thirty inch pipe. As the water level built up inside the box the boys were unable to remove the boards; as a result the campanion drowned and Paul Lucero suffered serious injury. Paper warning signs had been affixed to the diversion box from time to time but there was no warning sign there on the date of the accident.

Lucero makes a persuasive argument that the SALLADAY doctrine has no logical justification in modern Arizona and that the artificial structure in this case is a far different condition than the rural open canal situation that was the factual basis of the SALLADAY decision.

We have just decided the case of ELKINS v. ROOSEVELT WATER CONSERVATION DISTRICT, 22 Ariz. App. 130, 524 P.2d 964 (1974), which is directly on point. We believe the reasoning in that case has equal application here.

In our opinion the SALLADAY case and its progeny grant negligence immunity to the Irrigation District in this case. Only the Arizona Supreme Court can modify these prior decisions. McKAY v. INDUSTRIAL COMMISSION, 103 Ariz. 191, 438 P.2d 757 (1968).

The judgment of the trial court is affirmed.

/s/ Jack L. Ogg
JACK L. OGG
Judge

CONCURRING:

/s/ Francis J. Donofrio
FRANCIS J. DONOFRIO
Presiding Judge
Department A

/s/ Henry S. Stevens
HENRY S. STEVENS
Judge

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED SEP 27 1974
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By /s/ Muriel S. Hume
Muriel S. Hume, Deputy

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SEPTEMBER 27, 1974

PAUL LUCERO, a minor child, by his next best friend and mother, SYLVIA LUCERO,	1 CA-CIV 1946 DEPARTMENT A
Appellant,	MARICOPA County Superior Court
v.	No. C-240182
ROOSEVELT IRRIGATION DISTRICT,	ORDER
Appellee.	

Appellant's motion for rehearing and the appellee's objection thereto have been considered by Judges Donofrio, Ogg and Stevens.

IT IS ORDERED denying the

motion for rehearing.

/s/ Francis J. Donofrio
FRANCIS J. DONOFRIO
Presiding Judge
Department A

A true copy of the
foregoing order was
mailed this 27th day
of September, 1974, to:

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CLASSIE GANTT, Clerk

By

/s/ Muriel S. Hume
Deputy Clerk

SUPREME COURT

STATE OF ARIZONA

November 20, 1974

PAUL LUCERO, a minor child, by his next best friend and mother, SYLVIA LUCERO,	Supreme Court No. 11776-PR
Appellant,	Court of Appeals No. 1 CA-CIV 1946
v.	
ROOSEVELT IRRIGATION DISTRICT,	Maricopa County No. C-240182
Appellee.	

The following action was taken by the Supreme Court of the State of Arizona on November 19, 1974 in regard to the above-entitled cause:

"ORDERED: Petition for Review = Denied."

Justice Lorna E. Lockwood and Vice Chief Justice James Duke Cameron voting to grant.

Record returned to the Court of Appeals, Division One, this 20th day of November, 1974.

CLIFFORD H. WARD, Clerk

By /s/ Mary Ann Hopkins
Deputy Clerk

To: Meadow, Nastro & Thrasher, 416 Luhrs Building, Phoenix, AZ. 85003 ATTN: Stephen T. Meadow, Esq., and Kenneth A. Winsberg, Esq.
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Hon. Donald F. Froeb, Judge of the Superior Court, 101 West Jefferson, Phoenix, AZ. 85003
Classie Gantt, Clerk of the Court of Appeals, Division One, 1700 West Washington, West Wing, Phoenix, AZ. 85007

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IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1974

No. 74-1022

PAUL LUCERO, a minor child,

Petitioner,

vs

ROOSEVELT IRRIGATION DISTRICT,

Respondent.

On Petition for Writ of Certiorari
to the Supreme Court
of the State of Arizona

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion below is adequately set forth in the Petition as contained in the Appendix thereto.

JURISDICTION

It is Respondent's position that this

case is not one over which this Court should exercise jurisdiction. Petitioner states that the jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), which states that final judgments rendered by the highest court of a State may be reviewed by the Supreme Court where the validity of a State statute is drawn in question as being repugnant to the constitution of the United States. The special treatment afforded to water distribution systems by the State of Arizona rests not upon a statute or legislative enactment of any kind, but rather upon a judicial decision of the Supreme Court of the State of Arizona rendered in 1909 with respect to whether the turntable decision of Railroad Co. vs. Stout, 84 U.S. (17 Wall.) 657 (1873), applied to open flumes, irrigation ditches, etc., and if not, whether it should be extended to the same. With respect to whether

the turntable decision already applied to such water distribution facilities, the Court, in Salladay vs. Old Dominion Copper Mining & Smelting Co., 12 Ariz. 124, 100 P. 441 (1909), stated at 130, 442:

> "If the Stout case is to be considered as the annunciation of a doctrine of the liability of persons for such injuries to young children, the logical result of such doctrine would seem to be that every landowner must, at his peril, render his premises, as has been said, 'child proof'; but the decision in the Stout case was not a decision announcing a new rule of law, but it was an innovation upon the theretofore accepted rule that a landowner is not liable for the visible condition of his premises to one who enters upon them without permission. It is therefore an exception to a well-known rule of law, rather than in itself a rule of law. Whatever may seem to be the logical deduction that can be drawn from such exception to the rule, when applied to other conditions and circumstances, we do not believe it was the intention of the Supreme Court of the United States by its decision to include in such exception to the rule all cases of such injuries, however occasioned. The Stout case

> being an exception to the rule, we are inclined to confine the extent of the decision therein to conditions where the land owner has neglected some usual or customary precaution, or where the danger to be guarded against was temporary or unexpected, or not entirely open to observation--such conditions as the Supreme Court had before it and has passed upon in the two cases cited--and to hold that the decision does not reach cases where the danger is not only obvious, but where the object itself from which the danger arises is of such a character that, as has been said, 'from the reason of the thing and the customs of the community the defendant was entitled to assume that the plaintiff's natural guardians would protect him from any dangers attached thereto as they easily could and ought to have done.'"

The Arizona Supreme Court clearly felt that the turntable decision was an exception to the general rule and that it did not cover the conveyance of water in an open flume, irrigation ditches, etc.

With respect to whether the turntable decision should be extended to cover water

being conveyed in open flumes and irrigation ditches, the Court stated at 129, 442:

> "As to the latter question, we are clearly of the opinion that it should not be extended. It is a matter of common knowledge that alluring and attractive flumes, such as the one in question in this case, carrying running water, are extensively used in this territory, not only by miners in the necessary and proper conduct of their business, but by farmers in the necessary diversion and applications of the public streams to a beneficial use upon their lands in the cultivation of their crops. Not only flumes, but irrigation ditches, large and small, similar in purpose, construction, and use, and equally dangerous and alluring to the child, are to be found throughout the territory wherever cultivation of the land is carried on, and such conduits, practically impossible to render harmless, are indispensable for the maintenance of life and prosperity. There is no distinction that can properly be drawn for liability for injuries received by a child from any such various means of diversion or use of water. Both as a matter of law and as a matter of public policy we feel that the so called 'turntable doctrine' should not be

extended to cover such a case as is here presented."

Through a series of subsequent decisions, the Arizona courts have broadened the description of water distribution facilities to which it felt the turntable decision should not be extended to include cement irrigation boxes, City of Glendale vs. Sutter, 54 Ariz. 326, 95 P.2d 569 (1939), the maintenance of a wier at its pumps for the purpose of measuring water to be used for irrigation purposes, Lee vs Salt River Valley Water Users Association, 73 Ariz. 122, 238 P.2d 945 (1951), the failure to properly install and maintain a grate at the entrance to an underground culvert, Hersey vs. Salt River Valley Water Users Association, 10 Ariz. App. 321, 458 P.2d 525 (1969), and now the failure to install a grate on the downstream side of a diversion box diverting the flow of water from an underground box by way of the Arizona Supreme

Court's refusal to review the Arizona Court of Appeals' decision affirming summary judgment in favor of respondent.

In one of its most recent pronouncements with respect to the refusal to extend the turntable decision to waterways, the Arizona Supreme Court stated in Dombrowski vs Maricopa County Municipal Water Conservation District, 108 Ariz. 277, 496 P.2d 136 (1972) at 277, 138:

> "It may be that in a proper case there can be shown a 'meaningful distinction' between the immunity that this Court has historically given to open irrigation canals on the one hand, and the negligent design and maintenance of mechanical or electrical equipment, wiers, dams and diversion points in congested urban areas on the other hand. While this case is certainly tragic, we do not believe it presents such a 'meaningful distinction' that it would require us to modify our previous decision in this field of the law."

It is respondent's position that the decision as to whether the turntable doctrine applies to the facts in this case or

whether it should be extended to cover the same is clearly a matter for the Arizona judiciary and not one which involves a state statute or legislative function of any kind and, therefore, does not invoke the jurisdiction of this Court, pursuant to 28 U.S.C. §1257(3).

QUESTION PRESENTED

The ultimate question before this Court is whether the failure or refusal of the Arizona Supreme Court to extend the turntable decision (attractive nuisance doctrine) to the construction of underground irrigation pipes by irrigation districts is a violation of Petitioner's right to due process and equal protection under the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition, except that the matters for this Court's consideration do not involve the Arizona Constitution.

STATEMENT

This litigation involves a portion of respondent's irrigation system consisting of a diversion box, or turnout box, the purpose of which is to change the direction of the flow of water. The diversion box in question is approximately forty-eight inches wide by 105 inches deep. There was a ladder permanently affixed to the inside of the wall of the diversion box. In addition, there were two pipes entering the box--one from the upstream side, and one from the downstream side. The pipe entering on the upstream side carried water into the box through underground pipe of more than 2,500 feet in length. The top of the box was covered with a metal plate which had been welded to the box to prevent children from removing and discarding it. The pipe entering the box on the downstream side through which water emptied

from the box into an open lateral was thirty inches in diameter. There was no grate on the downstream side for the reason there would be no way to remove such trash as may accumulate behind the grate hindering the flow of water through the box.

On August 7, 1969, plaintiff and a friend entered the box from the downstream side, carrying with them several boards. Once inside the box, the boys deliberately boarded up the downstream pipe, preventing water from escaping, and apparently creating such pressure against the boards as the box filled with water that the boys were unable to remove them. Thus, they were unable to escape from the trap they had created for themselves, all of which caused injuries to the plaintiff.

Plaintiff brought suit against defendant, wherein plaintiff alleged that the

accident and injuries were the proximate result of defendant's negligence. The matter was decided in favor of respondent by the trial court on a motion for summary judgment wherein respondent argued that as a matter of law the possessor of land had no duty to a trespasser except to refrain from willful and wanton negligence and that the turntable decision of Railroad Co. vs Stout, supra, or attractive nuisance doctrine was not applicable as a result of Salladay vs Old Dominion Copper Mining & Smelting Co., supra, and its progeny. The trial court's decision was affirmed on appeal in the Arizona Court of Appeals, and the Petition for Review to the Arizona Supreme Court was denied.

ARGUMENT

Respondent has set forth in the jurisdictional section of this brief its argument that this Court should not exercise juris-

diction over the Arizona Supreme Court's judicial decision not to extend the attractive nuisance doctrine to the facts of this case.

If the Court finds that it may exercise jurisdiction, then, it is Respondent's position that the Court, in its discretion, should not accept review of this matter for the reason that the record clearly shows that the Arizona Supreme Court, by refusing to extend the attractive nuisance doctrine to irrigation systems, has judicially created a class of persons consisting of irrigation system owners for which it has granted an immunity from tort liability under the attractive nuisance doctrine arising from the negligent construction, maintenance and operation of the irrigation system. Furthermore, it is clear, from the record, that the Arizona Supreme Court's actions have not been arbitrary or

capricious, that they are not unreasonable and that they do have a real and substantial relation to the subject sought to be attained. Nebbia vs New York, 291 U.S. 502 (1934). Subsequent authorities are replete with similar language, such as Phillips Chemical Co. vs. Dumas School District, 361 U.S. 376, 385 (1960), wherein this Court stated:

> "It is true that perfection is by no means required under the equal protection test of permissible classification. ... In Allied Stores of Ohio, Inc. vs Bowers (U.S.), supra, for example, we noted that the State was 'dealing with (its) proper domestic concerns, and not trenching upon the prerogatives of the National government'. When such is the case, the State's power to classify is, indeed, extremely broad, and its discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary." (Citations omitted.)

In a United States District Court case involving a situation very similar to the present one, the court upheld a state law

as not being violative of the Fourteenth Amendment to the United States Constitution which exempted charitable institutions from the doctrine of respondeat superior in tort liability cases. After indicating that a state law, even though it discriminates in favor of a certain class, is not arbitary and violative of equal protection if the discrimination is founded on a reasonable distinction, the Court in Weeks vs Childrens Hospital of Philadelphia, 200 F.Supp. (E.D. Pa. 1961), stated at 79:

> "The state has the power to provide for the health of its citizens. Non-profit hospitals which are supported in large measure by state funds bear a close relationship with this power. The health of the state's citizens might properly be considered in possible jeopardy if these charitable hospitals were made liable under the doctrine of respondeat superior for tort injuries caused by their servants.[5]

Footnote 5 to the above quotation states:

> "Defendant Hospital, in its

> Reply Brief, alludes, for instance, to the liability insurance which the hospitals would have to procure, the additional expense involved both to the institutions and the state, the likely raise in hospital rates to help cover the additional expense, and the resulting withdrawal of opportunity to serve as many members of the community in the event of a change of the present rule."

See also the case of McDaniel vs Baptist Memorial Hospital, 469 F.2d 230 (6th Cir. 1972), where the court upheld as constitutional a Tennessee law which exempts hospitals from liability for breach of implied warranties of merchantability and fitness from a contract for sale of blood, which statute had the effect of immunizing the hospitals from strict liability in tort for the wrongful death of a patient alleged to have been caused by serum hepatitis due to transfusion of contaminated blood.

Indeed, what the Arizona judiciary has done is to single out irrigation and water distribution systems for special treatment

with respect to the application of the attractive nuisance doctrine for reasons rooted deep in the history of Arizona, an arid desert land whose very economic survival depends on its ability to furnish low cost water to farms, industry and others throughout the entire state. For this reason, as expressed in Salladay vs Old Dominion Copper Mining & Smelting Co., supra, and reaffirmed in Dombrowski vs Maricopa County Municipal Water Conservation District, supra, the Arizona judiciary has seen fit to draw a classification so as to enable irrigation and water distribution systems owners to distribute water throughout the state to the many consumers thereof at a realistic rate.

Petitioner's contention that the means selected does not have a real and substantial relation to the ends sought to be attained is simply not correct. Upon a

careful reading of Salladay, it is clear that the end sought was to enable irrigation and water distribution systems to deliver water to the users thereof at a reasonable, economic rate. The means chosen by the judiciary then and now were to grant an immunity to such distribution systems from tort liability under the attractive nuisance doctrine. Certainly, the abolition of the immunity heretofore granted to these water distribution systems would have severe economic impact through the undertaking of a nearly impossible task of rendering their waterways absolutely free from the inquisitive child, great losses of money in judgments against these systems owners, and increased insurance premiums if there be such a company willing to undertake so great a risk. All of these increased costs and risks of liability would necessarily greatly increase the cost

of water distribution, the very end which was sought to be prevented through granting of an immunity.

With respect to whether the immunity from tort liability under the attractive nuisance doctrine should be abolished and the economic impact that such an abolition would have upon the cost of water distribution in the State of Arizona, the Court in Dombrowski vs Maricopa County Municipal Water Conservation District, supra, had before it in the briefs for appellant, appellee and amicus curiae substantial arguments concerning all of the relevent considerations. The Court had before it two motions for leave to file amicus curiae briefs on behalf of Wellton-Mohawk Irrigatic and Drainage District, a municipal corporation, and Yuma County Water Users Association, an Arizona non-profit corporation, which briefs devoted themselves almost

entirely to the subject of the adverse economic impact that an abolition of the immunity from tort liability under the attractive nuisance would have on them individually and the entire state.

In view of the foregoing, it is difficult to conceive that the actions of the Supreme Court in Dombrowski vs Maricopa County Municipal Water Conservation District, supra, in reaffirming the immunity given to irrigation districts from tort liability under the attractive nuisance doctrine, were arbitrary and capricious and without a substantial relation to the end sought, that of enabling the low cost distribution of water "especially when the very life blood of our economic stability rest[s] upon the irrigation of our arid lands." Lee vs Salt River Valley Water Users' Association, supra.

Certainly, as the Court said in Dom-

browski, supra, at 277, 138:

> "It may be that in a proper case there can be shown a 'meaningful distinction' between the immunity that this Court has historically given to open irrigation canals on the one hand, and the negligent design and maintenance of mechanical or electrical equipment, wiers, dams and diversion points in congested urban areas on the other hand."

However, it is clear from the Court's actions in the present case that it did not feel this case presented such a meaningful distinction. It is also apparent from the foregoing that when the Court does find a case involving such a meaningful distinction it will not hesitate to carve out appropriate exceptions to the presently existing immunity.

CONCLUSION

Based upon the absence of proper jurisdiction and the fact that the immunity from tort liability under the attractive nuisance doctrine afforded irrigation districts is a

proper classification, based upon a sound, rational basis substantially related to the ends sought, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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March 13, 1975